No. 2709.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ALASKA PACIFIC FISHERIES, a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

PETITION FOR REHEARING.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff in Error.

THE JAMES H. BARRY CO.

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Comes now the Alaska Pacific Fisheries, plaintiff in error, and respectfully petitions this Honorable Court for a rehearing herein on the following grounds and for the following reasons:

This case involves to some extent the same questions that arose in the case of Alaska Mexican against the Territory and the case of the Alaska Pacific Fisheries against the Territory, No. 2731, but the Act under which the tax in this case was laid, being a different Act enacted by a subsequent Legislature, many of the objections that were urged against the Act under which the taxes were laid in those cases,

do not exist in this case. The most important proposition, however, that presented itself in those cases also presents itself here. This deals with the power of the Territorial Legislature to impose a license tax in Alaska without regard to the limitations upon the taxing power contained in the Organic Act, to the effect that all taxes must be uniform and assessed according to value, as well as the other limitations limiting the amount of the tax. This proposition was quite fully discussed in the Alaska Mexican against the Territory, and in the case of the *Alaska Pacific Fisheries* vs. *Territory,* No. 2731, some of the more important matters in relation thereto were pointed out more specifically so as to supplement what was said in the case of Alaska Mexican against the Territory. It is not necessary, therefore, that we should again go into this matter here and we therefore submit this proposition upon the reasons and the discussion presented in the two other cases.

One point of importance presents itself in this case that did not present itself, at least not in the same manner, in the other two cases, and that deals with the proposition that the tax in question is not a license tax but a property tax. While it is denominated a license tax it is assessed at the rate of $100 per fish trap.

This question was quite fully discussed in our brief where many authorities were cited and discussed to show that a tax of this character, although called a

license tax, is in fact a property tax and the special attention of the Court is directed to one of the cases referred to in the brief, which we think is exactly in point.

The Standard Oil Co. vs. *The Commonwealth,*
82 S. W., 1020.

This case is discussed on page 45 of the brief. In that case the Legislature of the State of Kentucky imposed what was denominated a license tax and one of the things enumerated upon which the tax had to be paid, was oil depots, and the amount was fixed at $10. We can see no difference in the act under discussion and the Kentucky Act, except that in the present case the tax is laid on fish traps at the rate of $100 each and in the Kentucky case it was laid on oil depots at the rate of $10 each.

The Supreme Court of Kentucky held this to be a property tax and void, because it was not assessed according to value. In this connection we wish to call the Court's attention to one further matter. The Court seem to have gathered the impression that there was some peculiar phraseology in common use in Alaska which lent to the language employed in the act a local meaning. There is nothing in the evidence or stipulation upon this point, and we know of no peculiar phraseology in use in the Territory that has any relation to the matter whatsoever.

Many other cases are referred to and discussed in

the brief, but we will not burden the Court by again reviewing them here.

Another point presented upon the argument of this case was that in view of the fact that some of the canneries in Alaska were so situated because of natural conditions, that fish were caught by seines, while others were so situated that their fish supply must be caught by the use of fish traps, a tax levied upon fish traps and not upon seines, or upon those who were obliged to use fish traps and not upon those who were able to catch their fish by the use of seines, is an unjust discrimination against those who are so situated that their fish supply must be secured by the use of fish traps. This question was also quite fully discussed in our brief so that a further discussion is not necessary.

We take it from the opinion that the Court did not disagree with us upon the point that persons situated like the plaintiff in error were discriminated against, but the Court were of the opinion that Congress might make such discrimination and might delegate the power to do so to the Territorial Legislature.

In relation to this matter, however, we think that the case is controlled by the decision of this Court in the case of *Peacock* vs. *Pratt,* 121 Fed., 272.

The power of the Territorial Legislature is by express provision of our Organic Act limited by the provisions of the Constitution of the United States

and such was also the case under the Organic Act of Hawaii and the validity of the tax in question in the Hawaii case was determined with reference to the provisions of the 14th amendment. The general rule, we think, with reference to this matter may be stated as follows:

That no tax may be imposed upon one person which is not imposed upon another similarly situated. And we think that our discussion in the opening brief clearly shows that under this rule canneries forced to use fish traps under the peculiar conditions existing in Alaska, stipulated into the record, are discriminated against in favor of those who are able to use seines.

It was also urged upon the hearing that since according to the stipulated facts some of the appellant's fish traps were not worth in excess of $1,000, the tax was confiscatory in its nature. The Court held that our contention in this regard was not well founded. But even though our contention were not well founded, it supplies a very forceful argument, in our judgment, why license taxes should not be permitted to be levied without regard to the value of the thing levied upon, for it shows how easily the limitations imposed by Congress to the effect that taxes shall not exceed 1 per cent. upon the value of the property taxed, can be evaded, if license taxes of the character herein

referred to can be imposed without regard to the limitations upon the taxing power.

Respectfully submitted.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff in Error.

J. A. HELLENTHAL hereby certifies that he is counsel for the plaintiff in error, the petitioner herein, and that in his judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.